UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D.C.

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M-36702

Memorandum

To: Secretary of the Interior

From: Solicitor

Subject: The Wilderness Act

At the meeting in your office on November 22, 1966, you asked three questions regarding the designation of areas administered by the Interior Department as wilderness under the provisions of the Wilderness Act, 78 Stat. 890 (1964), 16 U.S.C. 1131 (1964):

1. What are the consequences of failure to comply with the time schedules specified in section 3 (c) of the act?

2. What form of legislation is required to accomplish designation as a wilderness area?

3. Must proposed legislation accompany a wilderness recommendation?

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1.

Under section 3 (c) of the act, Interior is to complete its review and make its recommendations to the President within ten years from September 3, 1964. The President in turn is to make his recommendations to Congress not later than September 3, 1967, with respect to not less than two-thirds of these areas; and he is to complete recommendations as to the remainder by not later than September 3, 1974.

The act specifies no consequences in the event of failure to meet these deadlines. Obviously the Executive retains its constitutional power to make recommendations to Congress at any time. Likewise, Congress's power to legislate is unfettered. The time schedule specified, therefore, is nothing more than an instruction of an internal nature from the Congress to the President and affects neither the President's authority to make recommendations nor the authority of Congress to enact legislation. Accordingly, there are no legal consequences which ensue from the failure to meet the specified deadlines.

2.

As regards the form of legislation required to accomplish designation of a wilderness area, it should first be noted that only those wilderness areas in national forests created by the Wilderness Act itself are affected by the provisions of section 4 (c) and (d) of the act which set out specific prohibitions or

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authorize the conduct of particular activities therein. 1/ These sections of the act would not apply to Interior areas which might in the future become wilderness areas. Thus, if Congress should in the future enact a law which merely designates particular Interior areas as "wilderness areas" and does nothing more, that law would not invoke the prohibitions specified in 4(c) nor bring into play the special provisions set out in 4(d) which, among other things, continue the mining and mineral leasing laws in effect until midnight of December 31, 1983.

Second, it should be borne in mind that the Wilderness Act itself contains provisions intended to assure against the lowering of existing standards with respect to units of the national park system that may in the future be designated as wilderness. Section 3(c), which directs the review of Interior areas for potential wilderness status, provides that nothing contained therein shall "be construed to lessen the present statutory authority of the Secretary . . . with respect to the maintenance of roadless areas within units of the national park system." Section 4(a) (3) provides that the designation of any area

1/ Section 4(d) (2) may be an exception since, while it refers only to "national forest wilderness areas,"it does not in terms limit the reference to national forest wilderness areas designated as such by the act. Compare secs. 4(c); 4(d) (1), (3), (4) and (6); 5(a) and (c); and 6. Section 5(b), which also refers to national forest wilderness areas, likewise does not in terms limit the reference to those areas designated by the act. No opinion is ventured as to whether either section 4(d) (2) or 5(b) will extend to other national forest wilderness areas if designated in the future. It is, however, clear from their text that the omission from sections 4(a) and (b) of a limitation to wilderness areas designated by the act is intentional. These provisions obviously will apply to wilderness areas designated in the future unless Congress should provide otherwise.

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of a unit of the national park system as a wilderness area shall in no manner lower the standards evolved for the use and preservation of that area in accordance with the organic act of the National Park Service, the act of August 25, 1916, 39 Stat. 535, as amended, 16 U.S. C. 1, et seq. (1964), or the statutory authority under which the unit was created or under certain other acts including, among others, the Antiquities Act of June 8, 1906, 34 Stat. 225, 16 U.S.C. 431-433, and the Historic Sites Act of August 21, 1935, 49 Stat. 666, as amended, 16 U.S.C. 461, et seq. (1964).

The act of August 25, 1916, provides that the National Park Service is to promote and regulate the use of national parks, monuments and other reservations committed to its care so as to conform to their fundamental purpose. That purpose is to "conserve the scenery and provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." In this regard acts for many individual park areas supplement this objective by providing that the Secretary of the Interior shall make regulations providing for the preservation, from injury and spoilation, of timber, mineral deposits, natural curiosities, or wonders within the park and their retention in their natural condition. (E.g., 16 U.S.C. 22, 45b, 61, 92.)

Section 2 (a) of the Wilderness Act has a somewhat similar but more detailed statement of purpose specifying that congressionally designated wilderness areas "shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gatherings and dissemination of information regarding their use and enjoyment as wilderness." Both statements of purpose include the concept of preservation for the benefit of future generations. The only substantial difference, I believe, lies in the emphasis that the

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Wilderness Act lays on solitude and on avoiding the incursion of the accoutrements of civilization such as roads and accommodations for tourists and visitor convenience.

Considering both the Wilderness Act statement of purpose and the provisions of sections 3 (c) and 4 (a) (3) which guard against the lowering of national park system standards by the creation of wilderness areas covering national park system lands, it is obvious that Congress could only have intended by the Wilderness Act that wilderness designation of national park system lands should, if anything, result in a higher, rather than a lower, standard of unimpaired preservation.

Third, while not as explicit with respect to them, the act compels the same conclusion in the case of wildlife areas which may be designated as wilderness. Section 4 (b) of the act makes it the duty of an agency administering a wilderness area for any other purposes for which it was established to so administer it for such other purposes as to preserve its wilderness character.

Finally, it should be noted that the wilderness designation of an area by act of Congress is a Congressional withdrawal or reservation of the area from "public land" status (i.e., the withdrawn area is closed to entry, location, selection, sale or other disposition for administration as wilderness). There is no question that Congress can make a legislative withdrawal of an area, and by the provisions of the enactment restrict the activities which may take place upon the area. Accordingly, any act of Congress which simply designates an Interior administered area as "wilderness" would amount to a later, additional reservation of the area from "public land" status. Such a designation would bring into play sections 2 (a), 2 (b), 4 (a) and 4 (b) of the Wilderness Act. It could

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then be argued that such a Congressional designation would toll the applicability of the mining laws, the mineral leasing laws, and the development of water resource projects within the boundaries of a designated wilderness area, since mining, prospecting, mineral leasing, and water projects are clearly incompatible with the concept of wilderness preservation as expressed by Congress in section 2 of the act.

However, because of the variations in the bills introduced in the 87th and 88th Sessions of Congress regarding the method by which a wilderness system could be established, the legislative history of these bills, and the fact that the final enactment was a composite of the House and Senate versions, I should like to comment on the principal issues that appear to be presented regarding the form of legislation giving wilderness designation to lands under Interior administration.

The first issue is the extent to which it may be necessary or desirable to expressly restrict the applicability of the mining laws where it is intended that such activities not take place within a designated wilderness area.

It is a long-settled law that notwithstanding the broad textual reference in the mining laws to "lands belonging to the United States, both surveyed and unsurveyed," 2/ unless the lands are "public lands" i.e., open to entry, location, selection, sale or other disposal under the general public land laws, they are closed to activity under the mining laws. Oklahoma v. Texas, 258 U.S. 574 (1922); Rawson v. United States, 225 F. 2d 855 (1955), cert. den., 350 U.S. 934 (1956). Thus where lands have been reserved from the public domain, or acquired by the United States, the mining laws are inapplicable. Rawson v. United States, supra; 17 Ops. Att'y Gen. 230 (1881).

2/ Act of May 10, 1872, Sec. 1; R.S. 2319; 30 U.S.C. sec. 22.

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The rationale for this construction has been thus expressed:

> This section is not as comprehensive as its words, separately considered, suggest. It is part of a chapter relating to mineral lands, which in turn, is part of a title dealing with the survey and disposal of "The Public Lands." To be rightly understood of which it is but a part, and when this is done it is apparent that, while embracing only lands owned by the United States, it does not embrace all that are so owned. Of course, it has no application to the grounds about the Capitol in Washington, or to the lands in the National Cemetery at Arlington, no matter what their mineral value; and yet both belong to the United States. And so of the lands in the Yosemite National Park, the Yellowstone National Park, and the military reservations throughout the western states. Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply; and it never applies where the United States directs that the disposal be only under other laws. Oklahoma v. Texas, supra, at 559-560.

The only exceptions to this rule are statutory; where the withdrawal or reservation itself provides for the continued applicability, as to any or all minerals, of the mining laws; or where by a later order, the mining laws are made applicable. For example, Mt. McKinley National Park, Death Valley National Monument, Glacier Bay National Monument, and Organ Pipe Cactus National Monument are at present open to mining by special statutes. 3/ The Pickett Act of June 25, 1910, as amended (43 U.S.C. secs. 141-142), continues the applicability of the mining laws as to metalliferous minerals, and Congress in section 7 of the Taylor

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3/ 16 U.S.C. sec. 350; 16 U.S.C. sec. 447, 49 Stat. 1817; and 16 U.S.C. sec. 450z, respectively.

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Grazing Act (43 U.S.C. 315t) made both the mining and mineral leasing laws applicable to the lands embraced thereby.

For the above reasons, the mining laws are inapplicable to all national parks and monuments, except for the four specifically open to mining by statute, and, except as may otherwise by specifically provided for by statute or order, the same conclusion applies to all other units of the national park system and to all units of the national wildlife refuge system. 4/ It is obvious that a Congressional designation as wilderness will not make the mining laws applicable to those areas of the national park system or of the national wildlife refuge system where those laws do not now apply. Accordingly, for all areas of the national park system and the national wildlife refuge system which are now closed to mining, there is no necessity to include in the proposed legislation a section which specifically terminates the applicability of the mining laws on these areas.

Regarding the four areas of the national park system which are presently subject to the mining laws by statute and the six units of the national wildlife refuge system which are subject to the mining laws by the establishing withdrawal orders, 5/ a different problem is presented.

4/ In examining withdrawal orders establishing units of the national wildlife refuge system special consideration must be given to whether the area was withdrawn under the Pickett Act, rather than the inherent authority of the President to administer the public domain. Prospecting and mining for metalliferous minerals is permitted under a Pickett Act withdrawal.

5/ Clarence Rhode National Wildlife Range, Alaska; Cabeza Prieta Game Range, Arizona; Kofa Game Range, Arizona; Chas. M. Russell National Wildlife Range, Montana; Desert Game Range, Nevada; and Charles Sheldon Antelope Range, Nevada.

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The wilderness bills introduced in the Senate during the 87th Congress (S. 174) and the 88th Congress (S. 4) provided for the inclusion of Interior areas into the wilderness system by administrative action. Both bills provided that if neither the House nor Senate disapproved the inclusion into the system of a reviewed and recommended area, the area automatically became a part of the system. In commenting on S. 174 and S. 4 the Department stated that the mining laws would continue to apply to those portions of the four areas of the national park system which might be included in the wilderness system. (See S. Rept. 635, 87th Congress, 1st Session, pp. 12-13; S. Rept. 109, 88th Congress, 1st Session p. 10.) In commenting on S. 4 the Department also stated that it viewed section 6 (a), which provided that nothing in the act shall be interpreted of any park or monument or other units of the national park system or any wildlife refuge or game range, and section 6 (c) (5), which provided that any existing use or form of appropriation authorized or provided for in the Executive Order or legislation establishing any national wildlife refuge or game range existing on the effective date of this act may be continued, as preserving the status quo to the maximum extent in the management of the Federal reservations. 6/

The wilderness bills introduced in the House during the 87th Congress (H.R. 776) 7/ and the 88th Congress (H.R. 9070 and H.R. 9162) 8/ provided for the designation of areas for inclusion in the wilderness system by act of Congress, rather

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6/ Letter of February 21, 1963, to the Chairman, Committee on Interior and Insular Affairs, U.S. Senate. S. Rept. 109, pp. 22-24. See also p. 11 of S. Rept. 109.

7/ In the 87th Congress eight bills were introduced. H.R. 776 received major consideration including Committee report.

8/ In the 88th Congress 19 bills were introduced. H.R. 9070 and H.R. 9162 received major consideration with the Committee reporting on H.R. 9070.

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than administrative action. The House bills provided generally, as now contained in section 4 (a) of the Wilderness Act, that the purposes of the act are within and supplemental to the purposes for which units of the national wildlife system and national park system are established and administered and that nothing in the act shall modify the statutory authority under which units of the national park system are created. In commenting on the House bills the Department stated that subsequent enactments designating particular areas as wilderness will need to contain provisions which are deemed appropriate with respect to non-wilderness uses, i.e., mining, mineral leasing, etc. 9/

In the light of the Department's comments on the various House and Senate bills, the fact that the final enactment was a composite of both House and Senate versions, and the judicial disfavor of repealing specific statutes by implication, I would suggest that any legislation recommending wilderness status for Mt. McKinley National Park, Death Valley National Monument, Glacier Bay National Monument, Organ Pipe Cactus National Monument, and the previously discussed six units of the national wildlife refuge system contain a section which expressly extends or terminates, as may be determined to be desirable in any case, the applicability of the mining laws on the recommended wilderness area. Only through an act of Congress which specifically resolves the issue of the applicability of the mining laws to those areas which are subject to the mining laws by statute or Executive or public land order, can the created ambiguities be resolved.

9/ Letter of December 12, 1963, to Chairman, Interior and Insular Affairs Committee, House of Representatives, H. Rept. 1538, 88th Congress, 2nd Session, p. 15.

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The second issue relates to the extent to which it may be necessary or desirable to expressly restrict the applicability of the mineral leasing laws where it is intended that such activities not take place within a designated wilderness area.

Unlike the Mining Law of 1872, the Mineral Leasing Act specifically denominates certain classes of government-owned lands that are excluded from its operation. These are lands in incorporated cities, towns, and villages, in national parks and monuments, in the naval petroleum and oil shale reserves, lands acquired under the Appalachian Forest Act, and lands acquired by the United States subsequent to passage of the act. 10/ Here again it is obvious that lands in national parks and monuments, being expressly excluded from the Mineral Leasing Act, will not become subject thereto by being designated as wilderness. 11/ Similarly, areas of the national wildlife refuge system which are specifically closed to mineral leasing by the terms of a public land or Executive Order will not become subject to the mineral leasing activities through a wilderness designation. In addition to the reasons previously discussed this conclusion is also supported by section 4 (a) of the act, which states "The purposes of this chapter are hereby declared to be within and supplemental to the purposes for which . . . units of the national park and national wildlife refuge systems are established and administered." (Emphasis added)

Regarding the application of the mineral leasing laws, the Department has held over the years that a withdrawal of land from only "public land" status, e.g., from entry, location, selection, sale or other disposition, does not toll the applicability of the mineral leasing laws. 48 L.D. 459;

10/ 30 U.S.C. sec. 181.

11/ National parks and monuments are also specifically excluded from the operation of the Mineral Leasing Act for Acquired Lands, 30 U.S.C. 351-359. Consequently the same conclusion is applicable.

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Martin Wolfe, 49 L.D. 625 (1923) ; J.D. Mell, et al., 50 L.D. 308 (1924); Noel Teuscher, 62 I.D. 210 (1955). This interpretation was upheld by the Supreme Court in Udall v. Tallman, 380 U.S. 1 (1965). The withdrawal order must express a clear intent to toll the application of the mineral leasing laws. The withdrawal of land from mineral leasing should not be confused, however, with the Secretary's discretionary authority to refuse to grant a mineral lease. In the Tallman case the Kenai Moose Range was open to mineral leasing, but the Secretary refused to grant leases until adequate plans were developed for the protection of the wildlife values of the area. The manner in which the Secretary exercises this discretion regarding oil and gas leases on areas of the national wildlife refuge system is set forth in 43 CFR 3120.3-3. The exercise of this discretion by refusing the lease is not a withdrawal of the area from mineral leasing and a wilderness designation of such an area would not, in my judgment, toll the mineral leasing laws. On the other hand, land withdrawn from mineral leasing would be permanently closed to leasing by the grating of wilderness status to such an area because of the application of section 4 (a).

Accordingly, I would recommend that a section specifically extending or terminating the mineral leasing laws, as may be determined to be desirable in any given case, be included in any proposal to grant wilderness status for all areas of the national wildlife refuge system which are not closed to mineral leasing by a public land or Executive Order, and all units of the national park system, except parks and monuments.

Should the geothermal steam leasing legislation become law in the form in which the Department transmitted it to the Congress on February 2, any wilderness area created on the lands of the national park system which are administered in accordance with the act of August 25, 1916, on areas of the national wildlife refuge system, on fish hatchery lands

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or on lands within a national recreation area would be closed to geothermal leasing. The reason is that under section 15 (c) of the bill such lands would not, in their present status, be open to geothermal leasing. For reasons already discussed, inclusion of such lands in wilderness areas would continue their nonavailability for geothermal leasing. I would, however, recommend a specific section which would eliminate the applicability of the geothermal leasing provisions in any bill designating as wilderness any portion of an area of the national park system that is not administered pursuant to the act of August 25, 1916, or is not within a national recreation area, even though it may be argued that the Congressional designation of the area as wilderness and application of sections 2 and 4 of the Wilderness Act prohibits such leasing activities.

In this context I would like to discuss one final issue, which is the development of water and power projects within the boundaries of areas which may receive wilderness designation. There are several areas of the National Park System which are subject to water development projects by the Bureau of Reclamation (e.g., Lassen National Park, 16 U.S.C. 201; Glacier National Park, 16 U.S.C. 161; Grand Canyon National Park, 16 U.S.C. 227). Accordingly, I would recommend that legislation giving wilderness status to such areas of the national park system contain a section specifically continuing or tolling the applicability of previous Bureau of Reclamation authorizations, whichever may be considered to be desirable in each case.

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3.

Section 3 (c) of the Wilderness Act calls for the Secretary to make recommendations as to wilderness status to the President and he, in turn, to the Congress. The law does not specify that a form of legislation shall be included with a favorable recommendation. However, I think it both logical and desirable that we propose the legislation by which our recommendation would be carried out. If recommendations are transmitted in a group, an omnibus type bill would be proposed.

A prototype draft of bill is under preparation. This draft will be useful in determining general format. Special provisions applicable to a particular area could, of course, be worked out later in connection with the recommendations for that area. The prototype bill could be adopted to omnibus form covering a number of areas. I shall transmit a draft shortly.

/s/ Frank J. Barry
Solicitor

M-36702 February 24, 1967

THE WILDERNESS ACT

Constitutional Law

A Congressional directive for the review by the Secretary of the Interior of areas with wilderness characteristics within a 10-year period affects neither the Executive's authority to make recommendations nor the authority of Congress to enact legislation, should the specified time period not be complied with.

Statutory Construction: Generally

The Wilderness Act was not intended to lower the existing standards with respect to units of the national park and national wildlife refuge systems.

Designation of an area as wilderness by act of Congress is a Congressional withdrawal of the area from "public land" status and brings into application certain sections of the Wilderness Act prohibiting, inter alia, commercial enterprises and permanent roads.

Statutory Construction: Legislative History

The language of the Wilderness Act and its legislative history indicate that Congress did not intend to open up to mining, oil and gas leasing, water resource projects, and other commercial activities areas that are now closed to such activities. Regarding areas where such activities now occur, proposed legislation recommending wilderness status to an area open to mining, oil and gas leasing, water resouce projects or reclamation authorizations should contain an express provision terminating or authorizing these activities, since the Congressional intention on this issue is not clear.

Solicitor's Opinion - Continued

Mines and Mining:

Lands which have been reserved from the public domain or acquired by the United States are not subject to the mining laws, unless opened by statute, or a withdrawal order provides for the continued applicability of the mining laws, or a later withdrawal order reinstates the applicability of the mining laws.

Mineral Leasing Act: Generally--Mineral Leasing Act for Acquired Lands: Generally

The withdrawal of lands from only public land status, e.g., from entry, location, selection, sale or other disposition does not toll the applicability of the mineral leasing laws. The withdrawal order must express a clear intent to toll the applicability of the mineral leasing laws.